Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 94-71
	)	
SANTA MONICA COMMUNITY COLLEGE DISTRICT	)	File No. BPED-920305ME
	)	
For Construction Permit for a New Noncommercial FM Station on Channel 201B Mojave, California	)	
	)	
LIVING WAY MINISTRIES	)	File No. BPED-920511MC
	)	
For Construction Permit for a New Noncommercial FM Station on Channel 205A Lancaster, California	)	

To: The Honorable Joseph Stirmer

OPPOSITION TO PETITION FOR LEAVE TO INTERVENE

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Santa Monica Community College District ("SMCCD"), acting pursuant to Section 1.294(b) of the Commission's rules, 47 C.F.R. 1.294(b), hereby opposes the Petition for Leave to Intervene filed by California State University, Long Beach ("CSU"), licensee of KLON(FM), Long Beach, California.

Introduction and Summary

CSU has petitioned to intervene in a proceeding which, for all substantive purposes, has been completed. The Presiding Judge has already approved a settlement agreement, granted the application of Living Way Ministries ("LWM"), accepted SMCCD's amendment to use channel 201B, and determined that SMCCD's application should be and would be granted upon receipt of approval by the FAA (which has since been secured).

CSU has filed an application to modify KLON's facilities in a way which conflicts with SMCCD's amended application. CSU therefore seeks to intervene in the instant proceeding in the hope that CSU can undo the settlement agreement approved by the Presiding Judge and be included in a comparative hearing with SMCCD.

CSU's petition has no merit whatsoever and should be summarily denied. CSU's petition is, in effect, a petition for reconsideration and is untimely either as a petition for reconsideration or for intervention. Even if it were timely filed, the petition would still have to be rejected. The action of the Presiding Judge was consistent with Commission rules and precedent, did not deprive CSU of any vested right, and should be sustained. CSU's plea for equitable treatment must also fail because such considerations are barred by statute and because any consideration of equities would plainly favor SMCCD.

I. Facts

On March 5, 1992, SMCCD filed an application for the Mojave facility proposing the utilization of Channel 204B. The application was accepted for filing by Public Notice on April 6, 1992. The April 6, 1992 Public Notice established a cut-off date for competing applications of May 11, 1992. See Report No. A-235.

On May 11, 1992, LWM filed an application with the Commission for a noncommercial FM station on Channel 205A in Lancaster, California.

SMCCD's application and LWM's application were deemed mutually exclusive under Section 73.507 of the Commission's rules. 47 C.F.R. § 73.507.

On June 27, 1994, the Commission issued a Hearing Designation Order ("HDO") to determine whether a grant of SMCCD's application or LMW's application would best serve the public interest. Santa Monica Community College District, 9 FCC Rcd 3134 (MMB 1994).

On June 28, 1994, SMCCD and LWM executed a Settlement Agreement ("Agreement"). The Agreement contemplated that both SMCCD's and LWM's applications would be granted by the Commission. To that end, SMCCD and LWM agreed that (a) SMCCD would amend its application to propose the use of Channel 201B and thereby eliminate the conflict with LWM's application, and (b) the parties would prosecute a Joint Petition for Approval of Settlement Agreement to secure a grant of both applications.

On July 1, 1994, SMCCD and LWM filed a Joint Petition for Approval of Settlement Agreement ("Joint Petition") with the Commission. On July 5, 1994, SMCCD filed its Petition for Leave to Amend.

On July 14, 1994, the Mass Media Bureau filed Consolidated Comments supporting a grant of the Joint Petition and acceptance of SMCCD's amendment.

By Memorandum Opinion and Order adopted on July 21, 1994 and released on July 25, 1994, the Presiding Judge (a) granted the Joint Petition, (b) accepted SMCCD's amendment, (c) granted LWM's

application, and (d) concluded that SMCCD's application is "grantable" and would be granted upon receipt of FAA approval.[1/] Memorandum Opinion and Order, FCC 94M-453 (ALJ July 25, 1994) ("Order").

In the meantime, CSU filed an application on July 13, 1994 to modify KLON's facilities. If CSU's application were granted, KLON would cause objectionable interference to SMCCD's Station.

On July 21, 1994, CSU's modification application appeared on Public Notice as "accepted for filing."[2/]

On August 22, 1994, SMCCD filed an informal objection to CSU's application. SMCCD explained the foregoing chronology. CSU recevied a copy of SMCCD's objection on August 22, 1994. See CSU Petition for Leave to Intervene.

On September 1, 1994, SMCCD filed an amendment with the requisite approval from the FAA. As specified in the Order, SMCCD requested that its amendment be accepted and that its application be granted.

On September 3, 1994, the Order of July 25, 1994 became "final" (meaning that it was no longer subject to reconsideration or review by the Presiding Judge, the Review Board, or the Commission). 47 C.F.R. §§ 1.4, 1.113, 1.117, 1.294.

[1/] SMCCD's application could not be granted immediately because the FAA determination originally submitted by SMCCD required that any change in frequency or power be reflected in a new application to the FAA. SMCCD submitted an application to the FAA on July 1, 1994.

[2/] CSU incorrectly asserts that its application appeared on Public Notice on July 19, 1994. In fact, it appeared July 21, 1994. See Report No. 15856, page 3, attached hereto.

On September 7, 1994, CSU filed its Petition to Intervene in the instant proceeding.

II. CSU's Petition Is Untimely And Without Merit

Section 1.223(c) of the Commission's rules governs consideration of any petition by any party to intervene in a proceeding more than 30 days after the hearing designation order has been published in the Federal Register. The petitioner must show how its "participation will assist the Commission in the determination of the issues in question. . . ." 47 C.F.R. § 1.223(c).

CSU contends that (1) SMCCD's amendment allegedly was not placed on Public Notice, (2) because SMCCD's amendment allegedly was not placed on Public Notice, CSU did not know and could not have known about the amendment, (3) SMCCD's amendment constitutes a "major amendment" under the Commission's processing rules, (4) since it is a major amendment, SMCCD's application must be comparatively considered with any other conflicting application -- regardless of when that other application was filed, (5) CSU is entitled to be comparatively considered with SMCCD's amended application, and (6) CSU should therefore be allowed to intervene in the instant proceeding to require SMCCD's amended application to be returned to the processing line or to allow for comparative consideration of CSU's application in the instant proceeding.

CSU's petition grossly mischaracterizes applicable law. Indeed, it is noteworthy that CSU's petition does not -- and cannot -- cite any authority to support its various assertions. Consideration of relevant authorities demonstrates beyond dispute that CSU's petition is nothing more than a belated but hopeless effort to preserve its options.[3/]

A. Public Notice of SMCCD's Amendment

CSU repeatedly blames its inability to participate earlier on the failure of the Commission to provide any Public Notice of the filing of SMCCD's amendment. According to CSU, the amendment did not appear on any computer database of the Commission's or on any Public Notice report issued in conjunction with the Commission's Daily Digest.

CSU's argument reflects a total disregard of applicable rules governing Public Notice. Section 1.4(b) of the Commission's rules states that

> the term "public notice" means the date of any of the following events:
>
> * * *
>
> (2) For non-rulemaking documents released by the Commission or staff, whether or not published in the Federal Register, the release date. . . .

[3/]As CSU acknowledges, it can modify its proposal to avoid any interference with SMCCD's amended application and preserve its status in the processing line. SMCCD has already made a compromise and sacrificed some population coverage in order to reach an accommodation with LWM. CSU, however, is unwilling to make any compromise in pursuit of its modification.

47 C.F.R. § 1.4(b). In short, contrary to CSU's hopeful assertions, Public Notice of a decision in a comparative hearing such as the instant one occurs when the text of any order is released.

The Presiding Judge's Order was released on July 25, 1994. That document contained an explanation of SMCCD's amendment to use Channel 201B. Public Notice of SMCCD's amendment was therefore provided on that date, and CSU is charged with knowledge of that notice.[4/]

The provision of Public Notice of SMCCD's amendment on July 25, 1994 not only undercuts CSU's explanation for failing to participate earlier. Of greater significance, Public Notice of SMCCD's amendment on that date completely undermines any claim by CSU that its participation can assist the Commission in the disposition of the instant proceeding.

The Presiding Judge's Order of July 25, 1994 has now become final and is no longer subject to reconsideration or review by the Presiding Judge, the Review Board, or the Commission. Although petitions for reconsideration do not lie with respect to interlocutory decisions in hearing, the Presiding Judge has the power to reconsider his or her own decision for 30 days after Public Notice. 47 C.F.R. §§ 1.113(a), 1.291(c)(3). It should

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[4/]There is nothing unusual about provision of Public Notice of SMCCD's amendment through the release of the text of a Presiding Judge's Order. Amendments during the course of a hearing are not handled by the Mass Media Bureau's processing staff and are not included on the Public Notice reports in the Daily Digest.

also be emphasized that the 30-day period for filing petitions for reconsideration is prescribed by statute and cannot be altered by the Commission. 47 U.S.C. § 405 ("[a] petition for reconsideration must be filed within thirty days from the date upon which Public Notice is given of the order, decision, report or action complained of"); Walter Communications, Inc., 8 FCC Rcd 53 (CCB 1993); ("[b]ecause the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period").[5/]

CSU is also prohibited from filing any appeal to the Review Board of the July 25, 1994 Order's approval of the parties' Agreement. Any such appeal had to have been filed with the Review Board "within 10 days after the ruling [was] released." 47 C.F.R. § 1.302(b). See 47 C.F.R. § 1.301(a)(4).

As the Order made clear, the Agreement between SMCCD and LWM was premised on a grant of their respective applications. Absent a grant of either one, the Agreement could not achieve its stated purpose and would have to be denied. Since approval of the Agreement has now become final (along with a grant of SMCCD's

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[5/]On one occasion, the United States Court of Appeals for the District of Columbia Circuit waived the statutory prohibition because a party to the action had not received the "customary notice" announcing its decision and the party was unrepresented by counsel. See Reuters Ltd. v. FCC, 781 F.2d 946, 951-52 (D.C. Cir. 1986), citing Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976). As the court explained in Reuters, supra, the Gardner court "took great pains in the clearest of language to limit its holding to the highly unusual circumstances presented there. . . ." 781 F.2d at 952. In the instant situation, CSU is represented by counsel, is not a party to the action, and was not deprived of notice customarily sent to parties to an action.

associated amendment), and since the Presiding Judge stated that the only remaining item was the ministerial task of granting SMCCD's application upon receipt of FAA approval, CSU's participation cannot be of any assistance to the Commission. On this basis alone, CSU's petition must be denied.[6/]

B. SMCCD's Proposal Not A Major Amendment

According to CSU, SMCCD's amendment to use Channel 201B constitutes a "major amendment" which must be returned to the "processing line" for comparative consideration with CSU's application to modify KLON's facilities. In the alternative, CSU proposes that it be allowed to intervene in the instant proceeding so that its modification application can be comparatively considered with SMCCD's so-called "major amendment."

CSU's argument proceeds from a total distortion of Commission processing rules. More specifically, CSU confuses the standards applicable to predesignation amendments with the standards employed in consideration of postdesignation amendments.

Section 73.3522(a)(6) of the Commission's rules governs pre-designation amendments and expressly states that such amendments are "[s]ubject to the provisions of § 73.3525, 73.3573, and 73.3580. . . ." 47 C.F.R. § 73.3522(a)(6). Section 73.3573, in

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[6/] CSU's failure to act in a timely fashion is all the more inexcusable since, by its own admission, it received notice of SMCCD's amendment on August 22, 1994 -- two days before the reconsideration period expired.

turn, governs the processing of FM broadcast applications and provides that, "[f]or noncommercial educational FM stations, a major change is any change in frequency. . . ." 47 C.F.R. § 73.3573(a)(1). Consequently, if -- but only if -- SMCCD had proposed to change its frequency before its application were designated for hearing, the amendment would constitute a major change subjecting SMCCD to a return to the processing line.

However, SMCCD's amendment was proffered after the issuance of the HDO and is therefore subject to consideration under Section 73.3522(b), which governs postdesignation amendments. That latter subsection -- in contrast to subsection (a) of Section 73.3522 -- makes no reference whatsoever to Section 73.3573. Instead, subsection (b) provides that post-designation amendments will be considered "upon a showing of good cause." See Las Americas Communications, Inc., 5 FCC Rcd 1634, 1637-38 (1990) (subsequent history omitted) (applicant's proposed change in community of license accepted in order to facilitate settlement after issuance of the HDO even though such change would have resulted in applicant's return to the processing line if embodied within a predesignation amendment).

In the instant matter, the Presiding Judge concluded that SMCCD had demonstrated "good cause" for the acceptance of its amendment, and the amendment was duly accepted. On that basis, the Presiding Judge was able to approve the Settlement Agreement, grant LWM's application, and provide that SMCCD's application would be granted upon submission of FAA approval.

Contrary to CSU's contention, there is no inequity in denying comparative consideration for the KLON modification application under these circumstances. The filing of an application does not create any vested rights. The creation of rights is subject to applicable law and the Commission's rules -- a point underscored in Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989). In that case, two parties filed mutually exclusive applications for licenses in the Instructional Fixed Television Service in Orlando, Florida. One of the applicants was a local entity; the other, Hispanic Information & Telecommunications Network, Inc. ("HITN"), was a non-local entity. After the applications were filed, the Commission revised its rules to accord a conclusive priority to local entities. On that basis, the Commission dismissed HITN's application.

The United States Court of Appeals for the District of Columbia Circuit rejected HITN's subsequent challenge. The court observed that the Commission "surely is not obligated to rethink its policies on each occasion that it applies them to a particular set of facts" and that no legal right was compromised merely because HITN had filed its application prior to the issuance of the new rules: "The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." 865 F.2d at 1294-95, citing United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956).

CSU's situation commands even less sympathy than HITN's. CSU did not file its modification application before any change in the rules; rather, its application was filed in the face of long-standing Commission rules governing the processing of postdesignation amendments. Those processing rules authorize the grant of postdesignation amendments that might otherwise be deemed to be major amendments if proffered as predesignation amendments. E.g., WSKG Public Telecommunications Council, FCC 93M-14 (ALJ January 13, 1993) (granting an amendment to specify a new channel of operation for an FM applicant in conjunction with the approval of a settlement agreement among competing applicants).

To be sure, CSU may have believed and hoped that its modification application would be given due consideration with any competing application; but that hope had to be and must be tempered by the Commission's adherence to whatever action is deemed appropriate -- and becomes final -- under pre-existing processing rules governing postdesignation amendments. Compare Reuters Ltd. v. FCC, supra, 781 F.2d at 950-51 ("[a]d hoc departures from those [FCC] rules, even to achieve laudable aims, cannot be sanctioned," and thus cannot be used to allow comparative consideration of applications filed late due to an acknowledged ambiguity in FCC statements); JEM Broadcasting Company, Inc., 8 FCC Rcd 77 (1992) (no inequity in dismissing application under the "hard look" doctrine because "[a]pplicants do not have a vested interest in the facilities they seek").

Any equities for CSU, moreover, are far outweighed by the equities in SMCCD's favor. SMCCD filed its application more than two and one-half years ago. More than two years after the filing of that application, the Bureau finally issued the HDO. SMCCD then agreed to reduce its coverage in order to effect a Settlement Agreement with LWM and allow the grant of both of their respective applications. SMCCD obviously would not have agreed to that settlement and allowed the grant of LWM's application only to be returned to a processing line and subjected to comparative consideration with a newly-filed application.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that CSU's petition be dismissed or, in the alternative, denied.

Respectfully submitted,

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PUBLIC NOTICE

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News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

REPORT NO. 15856 BROADCAST APPLICATIONS July 21, 1994

STATE	FILE-NUMBER	CALL-LETTERS	APPLICANT + LOCATION	NATURE OF APPLICATION
INTERNATIONAL BROADCAST STATION APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING				
CM BRIB	-940701TB	KFBS	FAR EAST BROADCASTING COMPANY, INC. MARPI,SAIPAN N. ISL., CM	RENEWAL
NON-COMMERCIAL EDUCATIONAL FM APPLICATIONS FOR LICENSE OR LICENSE MODIFICATION ACCEPTED FOR FILING				
KS BMLED	-940617KI	KVCY 101.7MHZ	WISCONSIN VOICE OF CHRIST. YOUTH INC FORT SCOTT , KS	MOD. OF LICENSE (BLED-860402KD) FOR CHANGES
KS BLED	-940620KB	KCVS 90.7MHZ	NORTH CENTRAL KANSAS BDCASTING, INC. SALINA , KS	LICENSE TO COVER (BPED-901105MK) FOR NEW STATION
MN BMLED	-940711KA	KCRB-FM 88.5MHZ	MINNESOTA PUBLIC RADIO INC. BEMIDJI , MN	MOD OF LIC (BLED-830117AD) FOR CHANGES
MN BLED	-940711KY	KNBJ 91.3MHZ	MINNESOTA PUBLIC RADIO BEMIDJI , MN	LICENSE TO COVER (BPED-920609MA) FOR A NEW STATION.
MN BLED	-940711KZ	KNOW-FM 91.1MHZ	MINNESOTA PUBLIC RADIO, INC. MINNEAPOLIS-ST.PAUL , MN	LICENSE TO COVER (BPED-940420IC) FOR CHANGES. (FOR AUXILIARY PURPOSES ONLY)

-OVER-

INTERNATIONAL BROADCAST STATION APPLICATIONS ACCEPTED FOR FILING

TN BPIB	-940627TG	WWCR	WNQM, INC. NASHVILLE , TN	MP TO CONSTRUCT NEW ANTENNA AND ADD ONE TRANSMITTER

NON-COMMERCIAL EDUCATIONAL FM APPLICATIONS TENDERED FOR FILING AND ASSOCIATED MAJOR ENVIRONMENTAL ACTION NARRATIVE STATEMENT, IF INDICATED, ACCEPTED FOR FILING

WA	940712MA	KMIH 104.5MHZ	MERCER ISLAND SCHOOL DIST. NO. 400 MERCER ISLAND , WA	CP TO MAKE CHGS; CHG: ERP: 3.0 KW (H&V); HAAT: 69.13 KW (H&V); CHANGE CLASS TO A

NON-COMMERCIAL EDUCATIONAL FM APPLICATIONS RECEIVED BUT NOT YET ACCEPTED FOR TENDER

UT	940613IE	KCUA 92.5MHZ	COMMUNITY WIRELESS OF PARK CITY, INC COALVILLE , UT	ONE-STEP APPLICATION TO CHANGE CHANNEL TO 223C2

NON-COMMERCIAL EDUCATIONAL FM APPLICATIONS ACCEPTED FOR FILING
(MINOR CHANGE APPLICATIONS ARE SIMULTANEOUSLY ACCEPTED FOR TENDER)

AR BMPED	-940718JZ	KBHG 89.3MHZ	NATIONAL CHRISTIAN NETWORK, INC. FAYETTEVILLE , AR	MP(BPED 900823MA) FOR EXTENSION OF TIME 1ST REQUEST
CA BMPED	-940706IA	KWCP 89.3MHZ	LOGOS BROADCASTING CORPORATION SAN LUIS OBISPO , CA	MOD OF CP (BPED-910219MJ) TO MAKE CHGS; CHG ERP: 5.3 KW (H&V); HAAT: 432.7 METERS (H&V); CUESTA PEAK COMMUNICATIONS SITE, LOS PADRES NATIONAL FOREST, SAN LUIS OBISPO COUNTY, CALIFORNIA
CA BPED	-940713IZ	KLON 88.1MHZ	CALIF. STATE UNIV LONG BEACH FOUND. LONG BEACH , CA	CP TO MAKE CHGS, ERP 30KW(H&V); INSTALL DIRECTIONAL ANTENNA CHG CLASS TO 201B
NY BMPED	-940711JZ	WXHD 90.1MHZ	SHAWANGUNK COMMUNICATIONS MOUNT HOPE , NY	MP(BPED [illegible]) FOR EXTENSION OF TIME 5TH REQUEST

-O V E R -

CERTIFICATE OF SERVICE

I hereby certify this 16th day of September, 1994 that I have caused a copy of the foregoing Opposition to be mailed by first class mail, postage prepaid, to the following:

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